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# The Cannibal Cop: Why the Federal Courts Should Allow for a Free-Speech Defense in Conspiracy Cases

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*By: Hayden Watkins*

## INTRODUCTION:

"I want to take the opportunity to apologize to everyone who's been hurt, shocked and offended by my infantile actions."[1]

These were the words of Gilberto Valle ("Valle") as he appeared on the courthouse steps after being released from federal custody in the summer of 2014.[2] The general public knows Valle as the "Cannibal Cop".[3] Before his arrest, Valle appeared to be an all-around good citizen. Valle was a New York City Police Officer, who was married and had one child.[4] In 2013, Valle was convicted of conspiracy to commit kidnapping.[5] Specifically, Valle engaged in thousands of online conversations describing his desire to kidnap, rape, kill, cook, and eat women.[6] The women discussed ranged from mere acquaintances of Valle's to his wife.[7] Valle's conviction was overturned a year later by the Judge Paul G. Gardephe in the Southern District of New York.[8] Judge Gardephe determined that no reasonable jury could have found Valle guilty based on the weight of the evidence and therefore the verdict had to be overturned to prevent injustice.[9] Judge Gardephe relied heavily on the concept that Valle was expressing a fantasy and not conspiring to commit a crime.[10]

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[1] John Bacon, 'Cannibal cop' freed after conviction overturned. USA TODAY, Jul. 1, 2014 *available at http://www.usatoday.com/story/news/nation/2014/07/01/cannibal-cop-conviction-overturned/11894353/*
[2] *Id*.
[3] *Id.*
[4] *Id.*
[5] United States v. Valle, 301 F.R.D. 53 (S.D.N.Y. 2014)
[6] *Id*. at 53
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Valle, 301 F.R.D. at 56

This Note uses the Valle case as an illustrative example to clarify the line between mere deviant thoughts, i.e., words protected by free speech, and a conspiracy to commit a crime. This Note proposes that Valle should have be allowed to present a free speech defense to the jury to negate the element of intent required for a conspiracy charge.

Part one discusses the definition of conspiracy under federal law and subsequent court findings. Part two looks to the intent requirements of a conspiracy charge by discussing specifically the facts of the Valle case. Part three analyses the free speech defense, the Circuits application of that defense and how it is applicable to the Valle case.

## PART I: CONSPIRACY OVERVIEW

The crime of conspiracy was first codified in the United States by Congress and signed into law by President John Adams.[11] The Alien and Sedation Acts were intended to criminalize "disloyal aliens and licentious criticism."[12] The common law crime of conspiracy was completed when the defendants entered into the agreement.[13] It was not until the federal government codified conspiracy that additional requirements began to present themselves within the doctrine.[14] In 1949, the federal government codified conspiracy in 18 U.S.C. §371 and subsequently at the state level.[15] It wasn't until 1996 that the Second Circuit defined what elements constitute the act of conspiracy.[16] This section discusses key Supreme Court and circuit court opinions, which have developed the legal theory of conspiracy. Specifically, this part (a) discusses the agreement and overt acts requirements; (b) delves into the intent prong; and (c)

[11] Alien and Sedition Acts, Library of Congress http://www.loc.gov/rr/program/bib/ourdocs/Alien.html (last visited Feb. 2, 2015);
[12] *Id.*
[13] *See* The Oxford Companion To United States History *26* (2001);
[14] US v. Grunewald, 162 F. Supp. 626 (S.D.N.Y. 1958).
[15] *Id.*
[16] United States v. Pinckney, 85 F.3d 4 (2d Cir.1996).

addresses the possible defenses to a conspiracy charge.

*b. Agreements and Overt Acts*

There are three elements of conspiracy articulated by the Second Circuit in United States v. Pinckney. [17] First there must be an agreement to commit a crime.[18] Secondly, the actor must have the specific intent to achieve the objective of that agreement.[19] Finally, the actor must commit an "overt act to effect the object of the conspiracy."[20] The intent prong is the focus on this note. The agreement and overt act prongs are discussed briefly below for context.

I. Agreements

Knowledge of a plan to commit a crime is not enough to charge conspiracy.[21] There must be an agreement between the parties.[22] An agreement to commit a crime is also not enough: the co-conspirators must agree to commit all the elements of the charged crime. [23] That is, an agreement to embezzle is not the same as an agreement to commit murder to protect the embezzlement scheme. As explained by Hoffman v. Halden, "[i]n a criminal conspiracy, the conspiracy is the substance of the crime and the function of the overt act is to show that the agreeing or conspiring has progressed from the field of thought and talk into action. It completes the offense."[24]

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[17] *Id.*
[18] The Court in Pinckney articulated that conspiracy is an offense into itself and does not have to be attached to a completed crime. See Pickney page 8 citing *United States v. Feola,* 420 U.S. 671, 694, 95 S.Ct. 1255, 1268, 43 L.Ed.2d 541 (1975).
[19] *Id.*
[20] citing United States v. Montour*,* 944 F.2d 1019, 1024 (2d Cir.1991).
[21] Pinckney*,* 85 F.3d (1996).
[22] *Id.*
[23] Pinckney, 85 F.3d *citing* United States v. Rose, 590 F.2d 232, 235 (7th Cir.1978)
[24] Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959) overruled on other grounds by Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962)

Circumstantial evidence can satisfy the burden of proof in a conspiracy case.[25] There does not need to be direct evidence proving the words of an agreement. The agreement itself does not even need to be expressed.[26] As described by the First Circuit in United States v. Rodriguez-Velez, "criminal conspiracies are by their very nature clandestine, and a tacit agreement inferred from the surrounding circumstances can-and often does-suffice to ground a finding of willing participation."

An agreement can be inferred by other conversations and actions taken by the co-defendants.[27] The court may look to the facts and circumstances surrounding the actions of the defendants.[28] The courts have even held that the state does not need prove that the time, place or methods were necessarily agreed upon.[1] The courts tend to focus their analysis on the surrounding circumstances and proving intent to commit a crime and make an agreement. Not the direct evidence of the agreement itself.[29]

ii. Overt Acts

The line between fanciful conversation and a conspiracy to commit a crime are overt acts. Defining an overt act can divide juries and judiciaries. An overt act is an action taken by the defendant to further a conspiracy.[30] For example, if two women have an agreement to commit a bank robbery and they buy the necessary guns and masks, that is an overt act. The act of purchasing the guns and masks would be considered an overt act in furtherance of the conspiracy.[31] An overt act need not be an inherently criminal act.[32] The act only needs to be

[25] United States v. Rodriguez-Velez, 597 F.3d 32, 39 (1st Cir. 2010);
[26] *Id.*
[27] United States v. Boone, 951 F.2d 1526 (9th Cir. 1991);
[28] Rodriguez-Velez, 597 F.3d at 39.
[29] United States v. Gilboy, 160 F. Supp. 442 (M.D. Pa. 1958)
[30] *Id*.
[31] *Id.*

relevant to the objective of the criminal act.[33] To form a conspiracy under modern legal theory, there needs to be both an agreement between the defendants and an overt act committed.[34] However, the intent prong has been subject to more legal debate than the agreement and overt act elements combined.

*b. The Intent Prong*

Proof of specific intent to achieve the objective of that a criminal agreement is required to satisfy a conspiracy charge.[35] As discussed in United States v. Bacon, "mere association, standing alone, is inadequate; an individual does not become a member of a conspiracy [by] merely associating with conspirators known to be involved in crime."[36] The line between association and conspiracy is a muddled one. The unclear line that separates these two actors is intent.[37] Part II of this paper articulates the intent requirement of a conspiracy charge, specifically (a) what is required to prove intent; (b) what are the procedural requirements; and (c) what are the possible intent related defenses to a conspiracy charge.

i. Intent Requirements

There are two elements that must be satisfied to prove intent: (1) intent to form an agreement[38]; and (2) intent that the objective of their agreement be achieved.[39] Therefore, the

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[32] United States v. Slocum, 695 F.2d 650, 654 (2d Cir.1982), *cert. denied,* 460 U.S. 1015, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983). (Note: Be consistent. Underline or italicize. Not both. Please edit throughout).
[33] United States v. Montour, 944 F.2d 1019, 1026 (2d Cir. 1991) *citing* United States v. Diaz, 878 F.2d 608, 614–15 (2d Cir.), *cert. denied,* 493 U.S. 993, 110 S.Ct. 543, 107 L.Ed.2d 540 (1989)
[34] Pinckney, 85 F.3d (1996).
[35] United States v. Feola, 420 U.S. 671 S.Ct. 1255 (1975).
[36] United States v. Bacon, 598 F.3d. (2010).
[37] This statement is not to suggest that the courts have not debated the definitions of agreements and overt acts. It is meant to refocus the reader on the topic of this note.
[38] Feola, 420 U.S. 671
[39] *Id* .

government must first offer proof that an individual intended to enter into this agreement and was not just associated with the plan.[40] Additionally, the government must offer evidence to prove she intended to commit the act. That is, the discussion went beyond fantasy to intent to commit a crime. This is the specific intent requirement.

In People v. Cohn, the Supreme Court held, "[t]hat a specific intent must be proved is clear. It is not the agreement in conspiracy that causes the mischief; it is what the agreement portends."[41] The Court, held that the main question of whether or not intent exists is whether or not it has "crystallized."[42] That is, the conspiracy has reached a point where it is more than simple talk. There is a point where the intent to commit a crime becomes apparent.[43] Intent is the most crucial analysis of a conspiracy and is possibly the most difficult to element to negate.

ii. Procedural Requirements of Intent

Intent is a matter of fact and not a matter of law. If there is "sufficient evidence to establish the essential elements of a conspiracy, then it was for the jury to decide whether the [defendant's] actions represented fantasies or whether he and his coconspirator intended to go through with their gruesome plan."[44] Therefore, if sufficient evidence is presented, intent is a question for the jury.[45] The issue of insufficient evidence is reviewed when the state rests its case. For this reason, if there is insufficient evidence the issue should not be presented to the jury.[46] As discussed in United States v. Stewart, "a motion for a judgment of acquittal must be

[40] United States v. Rodriguez-Velez, 597 F.3d 32, 39 (1st Cir. 2010)
[41] People v. Cohn, 193 N.E. 150 (1934)).
[42] Feola, 420 U.S. 671
[43] *Id.*
[44] United States v. Depew, 932 F.2d 324 (4th Cir.1991).
[45] Morissette v. United States, 342 U.S. 246, 274, 72 S.Ct. 240, 96 L.Ed. 288 (1952).
[46] *Id*.

granted where, 'in order to find the essential element of criminal intent beyond a reasonable doubt, a rational juror would have to speculate.'"[47] The motion for acquittal rests on whether or not the facts presented to the court would show that the defendant actually intended to act on the agreement.[48]

*c. Lack of Defenses to a Conspiracy Charge*

When intent has passed the point of sufficiency and evidence is presented to a jury, possible defenses are limited. Unlikelihood of success, failure to achieve the desired result, and impossibility are all legally inadequate to prevent the finding of intent within a conspiracy: (1) unlikelihood is not a defense; (2) failure is not a defense, and (3) impossibility is not a defense.[49]

The Second Circuit articulated that likelihood is not a defense in a 1991 opinion.[50] The court cited to a Seventh Circuit decision.[51] Whether or not the planned crime is likely to be committed is not relevant to the analysis of intent. Conspiracy is its own crime.[52] It is not simply a piggyback charge to a substantive crime.[53]

The Second Circuit similarly held that failure is not a defense to conspiracy.[54] A conspiracy is established the moment an agreement is made to violate the law.[55] "[T]he crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts ...,

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[47] United States v. Stewart, 305 F.Supp.2d 368 (S.D.N.Y.2004) quoting United States v. Depew, 932 F.2d 324 (4th Cir.1991).
[48] *Id.*
[49] *See* United States v. Wallach, 935 F.2d 445 (2d Cir.1991); United States v. Trapilo, 130 F.3d 547, 552 n. 9 (2d Cir.1997); United States v. Hassan, 578 F.3d 108 (2d Cir. 2008).
[50] Wallach, 935 F.2d 445.
[51] United States v. Rose, 590 F.2d 232 (7th Cir.1978).
[52] *Id.*
[53] *Id.*
[54] United States v. Trapilo, 130 F.3d 547, 552 n. 9 (2d Cir.1997).
[55] *Id.*

and is not at all dependent upon the ultimate success or failure of the planned scheme."[56]

In 2008, the Second Circuit further held that impossibility is not a defense.[57] Whether or not it is technically possible for the substantive crime to be committed is not "persuasive or controlling" to the intent analysis.[58] The "essence" of a conspiracy is the agreement itself and not the substantive crime.[59] The above arguments are not legally sufficient defenses to the crime of conspiracy.[60]

What would be a legally sufficient defense against the crime of conspiracy? The jury's decision in Valle was overturned under a lack of sufficient evidence standard. However, (as discussed in Part III) the opinion appears to be applying all of the above defenses to the Valle facts.[61] This Note argues that this crafting was inappropriate and a free speech defense should have been presented to the jury at the first Valle trial.

## PART III: VALLE CASE

This Part discusses the evidence of intent presented in the case of Gilberto Valle and discusses how the court quilted together an insufficient evidence ruling based on faulty analysis. Valle was convicted of conspiracy to kidnap.[62] However, on review, the district court held that there was not enough evidence for a reasonable jury to find a genuine agreement to commit an actual kidnapping; or a specific intent on Valle's part to commit such a crime.[63] The court found

[56] United States v. Everett, 692 F.2d 596, 600 (9th Cir.1982).
[57] United States v. Hassan, 578 F.3d 108 (2d Cir. 2008).
[58] United States v. Meyers, 529 F.2d 1033, 1037 (7th Cir. 1976)
[59] *Id.*
[60] United States v. Hassan, 578 F.3d 108 (2d Cir. 2008).
[61] Specifically applying the defenses of (1) lack of imminence; (2) likelihood; and (3) failure to succeed.
[62] Valle, 301 F.R.D. at 57
[63] Supra, Note 2

that despite the mountain of circumstantial evidence, the evidence was not enough that a reasonable jury could have found intent on Valle's part.[64] "[H]is chats and emails about these interests are not sufficient—standing alone—to make out the elements of conspiracy to commit kidnapping."[65] This part: (a) examines the facts articulated by the Valle Court; (b) discusses the insufficient evidence standard; and (c) discusses how the Court in Valle used in applicable defense standards to satisfy the insufficient evidence standard.[66]

*a. United States v. Valle*[67]

Gilberto Valle and his coconspirators met and conducted most of their conversations over a dark sexual fantasy fetish website, darkfetishnet.com.[68] Each member of this website had a profile.[69] Valle's profile read, "I like to press the envelope but no matter what I say, *it is all fantasy*." (Emphasis added).[70] Valle used the dark fantasy website to discuss his desire to kidnap, rape, and eat women.[71] While Valle discussed kidnapping, cooking and raping women with over twenty-four people, only four individuals were charged.[72] The Government conceded that "nearly all" of the other conversations were merely fantasy.[73] Valle's codefendants were located in New Jersey, India, and Pakistan.[74] The men never spoke by phone or in person.[75] All the conversations between codefendants took place over the internet and were sporadic. Months

[64] Valle, 301 F.R.D. at 56
[65] Id.
[66] The Valle facts presented in Part III of this paper are limited to the facts presented to the jury and considered by Judge Gardephe in the Valle review.
[67] Valle, 301 F.R.D. (2014).
[68] *Id.*
[69] *Id.*
[70] *Id. at 65.*
[71] Valle, 301 F.R.D. at 54
[72] *Id*.
[73] *Id*. at 53.
[74] Id.
[75] Valle, 301 F.R.D. at 54

would go by with no conversation and then would pick up again as if no time had passed.[76] There is no evidence that any of the coconspirators knew of each other's true identities or locations.[77] However, thousands of internet chat transcripts were entered at trial.[78] Those transcripts discussed in graphic detail kidnapping, torturing, raping, murdering, and cannibalizing women.[79] Valle sent photographs via Facebook of his wife, female colleagues, and female college friends.[80] Valle and his internet contacts discussed raping, torturing, murdering and eating them.[81] Valle went as far as to create a blueprint for abducting and cooking his own wife.[82]

In 2013, a jury convicted Valle of conspiracy to commit kidnapping.[83] In 2014, that conviction was overturned on a lateral review.[84] Judge Gardephe wrote a sixty-five-page opinion in which the court held that there was not sufficient evidence presented that a reasonable jury could have found Valle actually conspired to kidnap these women.[85]

The court overturned the jury's verdict in Valle based on a lack of intent.[86] Specifically, the court specifically cited a lack of evidence presented to support a case for intent.[87] "There must be evidence that Valle actually intended to act on these interests with an alleged co-conspirator."[88] Included in the thousands of transcripts, the Government presented evidence that Valle and co-conspirator negotiated over price and that Valle expressed concern about getting

[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Valle, 301 F.R.D. (2014).
[80] *Id.*
[81] *Id.*
[82] *Id*. 73.
[83] *Id.*
[84] *Id.*
[85] Valle, 301 F.R.D. (2014).
[86] *Id* at 70.
[87] *Id*.
[88] *Id.* at 73.

caught.[89]. Most notably, Valle used his access to a police database to look up personal information about these women, which was not available to the general public.[90]

The facts that led themselves away from intent to commit this crime are numerous.[91] The court weighed heavily that while Valle had set dates and made plans for the specific kidnaping, the dates were repeatedly set and passed without action from Valle or others.[92] Valle also relayed false information to his alleged co-conspirators.[93] This false information included that he owned a van and a secluded cabin with a sound proof basement.[94] He also told his coconspirators that this fantasy basement included a pulley mechanism, human-sized oven, and a human-sized rotisserie.[95] The Court in Valle referred to the above missed dates and falsified locations as "vanishing intent."[96] The court found that the facts did not lend themselves to intent and therefore the government could not have met their burden.[97]

*b. Insufficient Evidence:*

At Valle's trial he moved for acquittal at the close of the Government's case.[98] The Defendant has the right to move for a judgment of acquittal before the matter is submitted to the jury.[99] After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence

[89] Government's Counter Intent Argument (Govt. Br. (Dkt. No. 195) at 9–10)
[90] *Id.* at 63.
[91] After citing the defendant's burden the Court immediately switched the burden back to the defense: "That burden is not an impossible one. [T]he government must introduce sufficient evidence to allow the jury to reasonably infer that each essential element of the crime charged has been proven beyond a reasonable doubt." Valle, 301 F.R.D. at 79 citing *United States v. D'Amato,* 39 F.3d 1249, 1256 (2d Cir.1994).
[92] Valle, 301 F.R.D. at 56
[93] *Id.*
[94] *Id*. at 4.
[95] *Id* at 2.
[96] *Id* at 30.
[97] Valle, 301 F.R.D. at 19.
[98] *Id.*
[99] Fed. R. Crim. P. 29

is insufficient to sustain a conviction.[100] *The court may on its own consider whether the evidence is insufficient to sustain a conviction.* (emphasis added)[101]

The Court reserved its decision.[102] However, because of the timing of the motion the Court then had to limit itself to only considering the facts put forth by the government at the time of the motion.[103] Even though the evidence went to the jury and they found Valle guilty, the review of the Valle cases challenged the judgment of acquittal.[104] Valle argued that the evidence should have never been submitted to the jury for determination.[105]

The danger with this type of appeal is it that it risks the judiciary substituting their judgment for that of the jury's judgment.[106] "Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold."[107]

The defense "carries a heavy burden" when attempting to overturn a jury's verdict based on lack of evidence.[108] The courts must view all of the evidence in the light most favorable to the government.[109] However, the Court in Valle, seemed to have switched the burden to the Government once again.[110] Citing repeatedly to the fact that the government "must introduce sufficient evidence to allow the jury to reasonably infer that each essential element of the crime

[100] *Id.*
[101] Fed. R. Crim. P. 29(a)
[102] Fed. R. Crim. P. 29(b)
[103] *Id.*
[104] Valle, 301 F.R.D. at 57
[105] *Id.*
[106] Cavazos v. Smith, 132 S. Ct. 2, 4, 181 L. Ed. 2d 311 (2011)
[107] *Id.*
[108] United States v. Oguns, 921 F.2d 442, 448 (2d Cir. 1990)
[109] *Id.*
[110] Valle, 301 F.R.D. (2014) .

charged has been proven beyond a reasonable doubt."[111] The Valle Court repeatedly focused on the sufficiency of the evidence to sustain the intent element of conspiracy.[112]

*c. Insufficient Evidence Standard Misapplied Using Inapplicable Theories of Defense*

The reviewing Court in Valle presented dozens of pages of facts that could lead a reasonable juror to find intent.[113] The Court negates those facts by calling them unlikely, impossible or failed attempts.[114] Very similar to the defenses not allowed by the federal courts (discussed in Part II). The heavy weight given to these facts could be a judicial crafting in order to avoid framing the facts as a defense that would be insufficient. As discussed in Part II above, there are three defenses courts have decided are insufficient to disprove intent: (1) likelihood defense; (2) impossibility defense; and (3) failure defense.[115]

The Second and Seventh Circuits held that likelihood is not a defense[116], "Whether the substantive crime itself is, or is likely to be, committed is irrelevant."[117] This means that whether or not Valle and his alleged conspirators were likely to meet up, kidnap, rape, kill and eat these women is not legally significant. Whether or not they were likely to succeed in their actions cannot be factored into the decision.[118] The court cites that Valle did not provide his coconspirators with the details they would need to kidnap the women.[119] While Valle provided his coconspirators with names, photographs and general locations of these women, he never

[111] United States v. Valle, 301 F.R.D. 53, 79 (S.D.N.Y. 2014); *quoting* United States v. Oguns, 921 F.2d 442, 448 (2d Cir. 1990)
[112] Valle, 301 F.R.D. at 72
[113] The opinion itself was 68 pages, most of which were filled with facts seemly supporting the intent prong.
[114] Valle, 301 F.R.D. at 74
[115] *See* United States v. Wallach, 935 F.2d 445 (2d Cir.1991); United States v. Trapilo, 130 F.3d 547, 552 n. 9 (2d Cir.1997); United States v. Hassan, 578 F.3d 108 (2d Cir. 2008).
[116] Wallach, 935 F.2d at 445
[117] *Id.*
[118] *Id.*
[119] Valle, 301 F.R.D. at 96.

provided anyone with the last name or addresses of the intended victims.[120] The court in Valle also weighs the fact that no kidnappings took place.[121] If these facts were viewed in a vacuum in the application of an argument of unlikelihood, this was insufficient to defeat a claim of conspiracy.[122]

The Supreme Court has held that impossibility of the criminal act is not a defense.[123] Conspiracy entails agreeing to commit a crime with the intent to commit that crime.[124] The court in Valle weighs heavily the impossibility of actually cooking these women, "the Defendant alleged 'real' chats contain concededly *fantastical elements*, such as human-size ovens and rotisseries, and non-existent soundproofed basements with non-existent pulley equipment."[125] The court discusses that the fact that Valle did not own any of these contraptions made this conspiracy impossible to complete and therefore it was all fantasy.[126] These elements pronouncing impossibility standing alone would probably not be enough to defend against a claim of conspiracy.[127]

Failure to complete the substantive crime is not a defense to conspiracy.[128] The court in Valle acknowledges that they targeted women, shared photos on the internet, conducted surveillance, and set a date for their kidnappings.[129] However, the court cites and repeatedly discusses that there were dates set for the alleged kidnappings and those dates passed with no

[120] Valle, 301 F.R.D. at 30.
[121] *Id.* at 34
[122] Wallach, 935 F.2d at 445
[123] United States v. Hassan, 578 F.3d 108, 123 (2d Cir. 2008) *citing* United States v. Jimenez Recio, 537 U.S. 270, 276, 123 S.Ct. 819, 154 L.Ed.2d 744 (2003)
[124] *Id.*
[125] Valle, 301 F.R.D. at 30.
[126] *Id.*
[127] Hassan, 578 F.3d at 123
[128] United States v. Trapilo, 130 F.3d 547, 550 (2d Cir. 1997)
[129] Valle, 301 F.R.D. at 96.

action taken.[130] Valle failed to take action or acknowledge the passage of these dates. The court in reviewing court in Valle relied on this fact heavily during their intent analysis. To fail to act on the selected days signaled a lack of intent.[131] This fact standing alone would probably not be enough to overrule the precedent set forth in United States v. Trapilo, where the Second Circuit held that failure is not a defense to conspiracy.[132]

Despite strong binding case law that would not allow for the facts above to lead to a valid legal defense, the Court instead uses them as a checklist to show lack of sufficient evidence.[133] The Court held that "[Valle] was engaged in fantasy role-play" and nothing more.[134] The Court held that this world of digital fantasy (despite action taken) was found to lack the real world intent and are therefore not a crime.[135] In this intense balancing of factors, what is and is not intent is muddled.

The above arguments are not viable defenses to conspiracy. However when combined with other defenses, create an insufficiency of evidence. Although it appears the Court is attempting to use these defenses to negate the factors establishing intent.

The Court in Valle acknowledged that the above defenses were the correct reading of the law but that it "misses the point."[136] The Court neglected to discuss what could be the most important consideration. Valle should have been allowed to present a First Amendment defense to the jury at his first trial. The reviewing Court in Valle's is most analogous to a protected speech framework than it is to an insufficient evidence standard.

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[130] Valle, 301 F.R.D. at 2.
[131] *Id.*
[132] United States v. Trapilo, 130 F.3d 547, 552 n. 9 (2d Cir.1997); ); United States v. Everett, 692 F.2d 596, 599 (9th Cir. 1982)
[133] Valle, 301 F.R.D. (2014).
[134] *Id.* at 2..
[135] *Id.* 4.
[136] *Id.* at 90.

## PART IV: FREE SPEECH

The First Amendment of the United States constitution provides that "Congress shall make no law … abridging the freedom of speech."[137] First Amendment protections do not traditionally extend to criminal conspiracies.[138]

In 1969, the Supreme Court decided Brandenburg v. Ohio.[139] Brandenburg was member of the Ku Klux Klan and made an anti-government speech calling for revenge against Congress, the Supreme Court, and the President.[140] The Brandenburg issue was not addressed in the lateral review of Valle and could be the most crucial. First Amendment protections were not raised at all during the Valle trial. Even if the Valle case had withstood conspiracy's specific intent requirement, it have run afoul the First Amendment Brandenburg standards as defined by post-Brandenburg circuit rulings.

The requirements as defined by the Circuits comply with the Brandenburg standard in their own right and lend themselves to the proposed standard in Valle. This section will articulate: (a) a historical overview of freedom of speech in the context of criminal charges; (b) the modern standards as defined in Brandenburg; (c) how some Circuits comply with the standards set forth by Brandenburg; and (d) discusses similar theories of free speech and conspiracy.

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[137] U.S. CONST. amend. I.
[138] Thomas Healy, Brandenburg in A Time of Terror, 84 Notre Dame L. Rev. 655, 731 (2009) *citing* United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990) (finding speech or writing employed in connection with participation in alleged conspiracy not protected by First Amendment).
[139] Brandenburg v. Ohio, 395 U.S. 444, 446, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969)
[140] *Id.*

*a. Historical Overview of Free Speech vs. Crime*

The articulated line separating conspiracy and free speech has changed over the past century. The first Supreme Court case dealing with the free speech in the criminal context appeared in 1927.[141] Justice Holmes created the "clear and present danger" test.[142] The question the Court asked was whether or not the defendant's words could possibly materialize into an actual crime that the Government has a right to prevent.[143] The clear and present danger test was overruled in 1951.[144] However, it wasn't until eighteen years later during the Vietnam War that a new clearer articulated test took its place.[145]

*b. Brandenburg v. Ohio*[146]

In 1969, the Civil Rights Movement was in full spring and the Vietnam War protests were numerous.[147] The Supreme Court looked for a way to distinguish words from a crime. Specifically, the Court was looking for a way to distinguish a "true threat" from a "political hyperbole."[148] The Court held that whether or not words were protected by free speech was a totality of the circumstances test.[149] The Court urged other courts to avoid looking at the words in isolation and instead look at the context in which the words were spoken. Later that year, The Supreme Court decided Brandenburg v. Ohio.[150]

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[141] Whitney v. California, 274 U.S. 357, 374, 47 S. Ct. 641, 647, 71 L. Ed. 1095 (1927)
[142] *Id.*
[143] *Id.*
[144] Dennis v. United States, 341 U.S. 494 (1951).
[145] *Supra*, note 54.
[146] Brandenburg v. Ohio, 395 U.S. 444, 446, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969)
[147] The Court in Brandenburg cites to these social circumstances as a policy support for their decision.
[148] Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).
[149] *Id.*
[150] Brandenburg v. Ohio, 395 U.S. 444, 446, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969)

The Court did not completely disregard Holmes' "clear and present danger" test but instead built upon the idea.[151] It expands on the concept of "present danger"[152]. It articulates an imminence requirement.[153] Most significantly, Bradenburg adds the intent requirement to free speech protection. It is not enough to speak words that will likely incite lawless action. [154] The actor must intend for the lawless action to take place. [155]This basic Bradenburg test appears to comply with conspiracy requirements. Intent is the central player in both tests. Intent is the line between fantasy and crime. If a person indeed engages in "fantasy speech," it would appear that she never intended for the target crime to actually be committed.[156]

*c. Circuit Compliance with Brandenburg*

This section addresses the narrower question as to how conspiracy, as defined by federal courts, complies with Brandenburg and subsequent conspiracy and Brandenburg circuit court decisions. The following circuits have addressed the Brandenberg in the conspiracy context.

The Second Circuit addressed conspiracy in the context of Brandenberg in multiple decisions. In 1990, the Second Circuit decided that the jury could not be charged with a possible Bradenberg defense if intent to commit a crime is found. [157] The Court noted that "it would have been better and made for a simpler and cleaner case if the district court had not referred to the First Amendment at all."[158]

[151] Brandenburg v. Ohio, 395 U.S. 444, 446, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969)
[152] *Id.*
[153] Overturning Scales v. United States; Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).
[154] Hassan, 578 F.3d 108
[155] I*d.*
[156] Valle, 301 F.R.D. (2014).
[157] United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990).
[158] *Id.*

Almost ten years later, the Second Circuitfocused on the difference between conspiracy and advocating.[159] One cannot merely associate with a crime or advocate for it.[160] The essence of conspiracy is an agreement to commit a crime.[161] Specifically, the intent analysis within that agreement is a requirement.[162] If the Second Circuit is focusing on the intent prong, what is stopping the jury from deciding if intent was present to overcome the free speech protections.

The Third Circuit held that, for the speech at issue to fall outside the purview of the First Amendment, the Court must determine that the speech (1) invited imminent lawlessness and (2) that the imminent lawlessness was likely to occur.[163] It addresses the connection between Brandenburg and conspiracy is the connection between the words and the crime.[164] In United States v. Fullmer, the Supreme Court distinguishes online postings "that are to incite lawless action vs. those that merely report on it after it has occurred."[165] The Third Circuit held strongly that First Amendment protections apply if there is no intent to cause lawless action.[166]

The Fourth Circuit makes clear that, while likelihood is not a defense against conspiracy, it is enough to invoke Brandenburg standards.[167] Rice v. Paladin, held that Brandenburg adds a likelihood requirement to disprove First Amendment protections.[168] The likelihood requirement means that it has to be likely that the speech would incite lawless action.[169] Not just that the defendant intended to incite lawless action. This attempts to further divide speech from

[159] United States v. Rahman, 189 F.3d 88 (2d Cir. 1999).
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] United States v. Fullmer, 584 F.3d 132 (3d Cir. 2009).
[164] United States v. Bell, 414 F.3d 474, 483 n. 9 (3d Cir.2005).
[165] *Supra,* Note 72
[166] Bell, 414 F.3d 474
[167] Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir.1997).
[168] *Id.*
[169] *Id.*

action.[170] The government must not only prove that someone intended an action to be completed but also that it is likely that the action will take place. Intent to commit something that is likely to happen.[171]

The Fifth Circuit, in Herceg v. Hustler Magazine, Inc., makes it clear that there is no application of Bradenburg as protection against a criminal actions whether it be aiding and abetting, extortion, criminal solicitation, conspiracy or harassment.[172] Herceg frames its opinion from a public policy position.[173] Brandenburg protections are in place to distinguish between crime and advocacy[174]. The Fifth Circuit focuses on the dual interest of society between ending crime and the free movement of ideas.[175]

In a series of cases the Seventh Circuit held that the legislature can outlaw specific speech if they are threats targeted at government informants.[176] There are no First Amendment violations in cases of threats targeted at governmental agents.[177] The Court once against stresses the imminence,[178] likelihood and intent considerations.[179]

The Seventh Circuit is very strict to the letter of Brandenburg.[180] The Court meets the minimum intent requirement and puts aside Brandenburg jury instructions.[181] The minimum requirement is that there was sufficient evidence for the jury to find intent.[182] The Seventh Circuit enforces the narrow reading of Brandenburg. The Circuit restricts the likely requirement

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[170] *Id.*
[171] Paladin Enters., Inc., 128 F.3d at 236
[172] Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir.1987).
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] United States v. Velasquez, 772 F.2d 1348 (7th Cir. 1985).
[177] *Id.*
[178] Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984).
[179] United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972).
[180] *Id.*
[181] *Id.*
[182] *Id.*

even more; it requires that it is likely to take place soon.[183] In, Alliance to End Repression v. City of Chicago, the circuit requires that the criminal act must be likely to take place soon and not in an unknown date in the distant future.[184]

The Eighth Circuit addressed the line between criminal activities and free speech issues with a series of cross burning cases.[185] The Court defined the line between protection and conspiracy as intent.[186] Court held that conspiracy convictions are not protected by the First Amendment when there was clear intent to intimidate.[187] The Eighth Circuit defines intent as the line between conspiracy and speech.[188] Intent must be found and the jury must be charged with all of the intent requirements.[189] If the jury is already determining a line of intent, they should be allowed to hear a free speech defense.

The Ninth Circuit's, most famous First Amendment case, Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, dealt with anti-abortion activists and the threat of force. Activists posted "Guilty" posters on a web site, including the names and addresses of abortion providers. The Court held that this constituted true "threats of force."[190] In United States v. Freeman, the Court overturned a conspiracy conviction.[191] The Court focused on the importance of dual intent.[192] Judge Kennedy stressed that "the jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his

[183] Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984).
[184] *Id.*
[185] United States v. Lee, 6 F.3d 1297 (8th Cir. 1993); United States v. McDermott, 29 F.3d 404 (8th Cir. 1994).
[186] *Id.*
[187] *Id.* at 1299
[188] *Id*.
[189] Lee, 6 F.3d 1297
[190] Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002), as amended (July 10, 2002).
[191] *Id.*
[192] United States v. Freeman, 498 F.3d 893, 899 (9th Cir. 2007)

words was to produce or incite an imminent lawless act, one likely to occur."[193] However, the Court declined to extend Brandenburg protection in "Threats of violence and other forms of coercion and intimidation directed against individuals or groups are, however, not advocacy, and are subject to regulation or prohibition."[194] There is no first amendment protection for a true conspiracy to commit a crime.[195]

All of the circuits discussed above have one thing in common. All of the circuit analysis stresses the intent element of conspiracy. This is the heart of the analysis that separates protected speech from a conspiracy. Juries are expected to interpret intent when deciding whether or not a conspiracy exists. If jurors can be expected to determine the existence of intent, it is not unreasonable to allow a jury to consider a free-speech defense.

The prosecution should present its case in chief and then the defense would argue that, even if the prosecution presented sufficient evidence of intent to go to a jury, evidence of intent to agree and intent to achieve the target crime, there is still a possible defense rooted in the First Amendment. This defense is based in the Circuit Courts interpretations of Brandenburg. Specifically, based in the Circuits holdings regarding imminence and likelihood.

[193] United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985).
[194] White v. Lee, 227 F.3d 1214 (9th Cir. 2000).
[195] *Id.*

*d. Free Speech and the Valle Case*

If jurors are competent to determine intent in a conspiracy charge, they are competent to determine whether or not free speech protections apply. Jury instructions are typically objective. "The majority of federal district judges carefully reviewed the law of intent. Based on the traditional principle that intent must be inferred from external manifestations" judges request that juries weigh the surrounding facts to find intent.[196] These instructions include both the charge and the presented affirmative defenses.

The Valle opinion (discussed in part III above) focuses heavily on Valle's lack of intent and the likelihood of the events taking place.[197] The Court seems to be forming their argument to fit squarely within the Brandenburg protected speech. The Court rests its decision on a lack of evidence. This is incorrect framing of the issue, even if the prosecution presented legally sufficient evidence of the intent to agree and the intent to achieve the target crime (kidnaping), Valle should still have been acquitted on free speech grounds.

Valle's criminal action would not have been imminent and were not even likely to occur. The Court in Valle listed numerous evidence produced by the state at trial to prove intent.[198] The Valle opinion argues that it was unlikely that Valle would have been able to complete this plot.[199] Likelihood is not a defense to a conspiracy charge (as discussed in part II above). It is, however, an element to prove that speech is not protected by Brandenberg.[200]

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[196]David M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205, 1355 (1983) *citing* Unites States v. Bold 8-9 (D. Or. 1919) (Interp. of War Stat. Bulletin 183); United States v. Equi 23 (D. Or. 1918) (Interp. of War Stat. Bulletin 172); United States v. Wishek 5 (D.N.D. 1918) (Interp. of War Stat. Bulletin 153); United States v. Fontana 6-7 (D.N.D. 1918) (Interp. of War Stat. Bulletin 148); United States v. Pierce 35, 37 (N.D.N.Y. 1918) (Interp. of War Stat. Bulletin 52); United States v. Doll 4 (D.S.D. 1917) (Interp. of War Stat. Bulletin 5).
[197] Valle, 301 F.R.D. (2014)
[198] Valle, 301 F.R.D. (2014).
[199] *Id.*
[200] Hassan, 578 F.3d 108 (2d Cir. 2008).

*d. The Morrison Theory*

Why does this analysis of conspiracy (or any inchoate offense) become so muddled? The relationship between free speech and conspiracy laws is very rarely noted. It is taken as black letter law that one cannot apply a free speech defense to a conspiracy charge.

Steven R. Morrison, in his piece *Conspiracy Law's Threat to Free Speech,* discusses the confusion and how conspiracy laws themselves create free speech problems.[201] Morrison argues that these laws discourage people from challenging the criminal system as a whole and are therefore violations of the First Amendment.[202]

Morrison acknowledges the heavy legal precedent that does not allow for First Amendment protections in a conspiracy setting.[203] However, he also acknowledges a modern shift in application of this precedent.

Morrison also discusses a groundbreaking decision by the Supreme Court in 2010.[204] In United States v. Stevens, the Supreme Court held that some depictions of animal cruelty are protected by the First Amendment.[205]

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[201] Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. Pa. J. Const. L. 865 (2014). Available at: http://scholarship.law.upenn.edu/jcl/vol15/iss3/4

[202] "Would you feel safe writing an article describing how easily people can illegally make [a] drug, and using that as an argument for why it's pointless to keep the drug illegal, when you know that your past praise of the drug might persuade a jury that the article is really intended to facilitate crime?" Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1278 (2005)

[203] United States v. Stevens, 130 S. Ct. 1577, 1599–1600 (2010) (noting that the First Amendment would not, in and of itself, be an automatic bar to statutory criminal liability for videographers engaged in a conspiracy to make live recordings to satisfy an underground market for videos of sadistic acts of animal cruelty); *see also* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (in the context of a case involving picketers of a commercial enterprise, noting that it "rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute").

[204] *Supra*, Note 210

[205] United States v. Stevens, 130 S. Ct. 1577, 1577 (2010).

Although Morrison feels the Court in Stevens limited its holding, the underlying decision that not all speech that facilitates criminal behavior is outside the protection of the First Amendment.

The Supreme Court's departure from traditional first amendment application to conspiracy symbolizes a move towards the recognition of free speech in a digital age. The line between reality and fantasy continues to blur. If the Supreme Court is taking into account free speech in an inchoate offense context, so should the lower courts. Jurors should be allowed to consider free speech as a possible defense when examining a conspiracy charge. The Court in Stevens illustrated how conspiracy and free are not squarely within separate camps.

## CONCLUSION

The Court in Valle and similarly situated cases should be allowed to present a free speech defense. While, the Court in Valle was correct in overturning the jury decision, the analysis missed the mark. The jury in Valle's trial was presented with sufficient evidence to determine the element of intent. Valle should have been allowed to present a free speech defense to the jury to negate the element of intent required for a conspiracy charge.